Eight Mile Style, LLC et al v. Apple Computer, Incorporated Doc. 86

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

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DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE "LATE PRODUCED" DOCUMENTS

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I. INTRODUCTION

Plaintiffs' motion to exclude documents that they say were "late produced" tells the Court much less than half the story about what the documents are, how Defendants came to produce and rely on them on summary judgment, and how Plaintiffs themselves have produced documents after the discovery cut-off *well into September* (including documents that have long been in Plaintiffs' possession and that they produced for the first time with their *August 28, 2008 summary judgment opposition*).

The documents that are the subject of this motion are licenses, contracts and/or agreements involving one or more co-authors of the musical compositions at issue in this case (hereinafter "Co-Author Agreements"). The Co-Author Agreements are significant because co-authors "are coowners of copyright in the work," 17 U.S.C. § 201(a), and each has "an independent right to use or license the use of a work." H.R. Rep. No. 94-1476 at 121 (1976). As relevant to this case, a co-author may license the work without the permission or consent of another co-author, the latter's exclusive remedy being limited to the possibility of seeking an accounting from the other co-author for the proceeds from such a license. *See Tang v. Putruss,* 521 F. Supp. 2d 600, 604 (E.D. Mich 2007) ("[E]ach joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner any profits ...").[1]

Plaintiffs fail to tell the Court that they asked Defendant Aftermath Records ("Aftermath") to produce Co-Author Agreements on June 10, 2008, eight days after the June 2 discovery cut-off. Plaintiffs also neglect to tell the Court that, with Plaintiffs' consent, Magistrate Judge Scheer entered an Order on Plaintiffs' own motion that required Defendants

[1] Plaintiffs have been paid for the exploitation of the compositions at issue in this case at the full rate they were entitled to receive, and they do not contend otherwise.

(1) to determine and disclose whether such documents existed by July 3, 2008, and (2) to produce any such documents promptly thereafter. Declaration of Kelly Klaus ("Klaus Decl.") Ex. 1 at ¶ 2(b) (June 25, 2008 Order on Plaintiffs' Motion to Compel). In accordance with this Order, on July 3, 2008, Aftermath stated that it had identified Co-Author Agreements and would produce them, and Aftermath therefore produced the Co-Author Agreements as they were located on a rolling basis throughout the month of July. Defendants relied on the Co-Author Agreements in the Revised Summary Judgment Motion that the Court ordered Defendants to file incorporating all of their arguments for summary judgment.

Plaintiffs' arguments for excluding the Co-Author Agreements are meritless. First, contrary to Plaintiffs' assertion, Aftermath's production of the Co-Author Agreements did not violate Rule 26. Rule 26(e) expressly provides that a party "who has responded to an interrogatory [or] request for production ... must supplement ... its disclosure or response ... as ordered by the court." Fed. R. Civ. P. 26(e)(1)(B). That is exactly what happened here: Aftermath supplemented its discovery responses and production pursuant to, and precisely as provided by, an Order that Plaintiffs themselves sought and agreed to. Nor has Aftermath violated the initial disclosure obligations of Rule 26(a). As set forth below, there never was a date for serving written disclosures because there never was a Rule 26(f) conference of counsel. Notwithstanding that Defendants did not serve a document labeled "Initial Disclosures," Defendants disclosed information and documents throughout discovery in this case. Aftermath's production of the Co-Author Agreements supplemented its prior production of documents and information relevant to this case, and it did so in accordance with the June 25, 2008 Order on Plaintiffs' Motion to Compel.

Second, even if Aftermath's production of the Co-Author Agreements was not in accordance with Rules 26(a) or 26(e), Aftermath's production was substantially justified, harmless, or both, and thus not the basis for any type of sanction. Fed. R. Civ. P. 37(c)(1).

Plaintiffs' cries of prejudice from being unable to take depositions based on the Co-Author Agreements ring hollow in light of the fact that Plaintiffs never asked for any such depositions – notwithstanding the fact that the parties previously dealt with Plaintiffs' late production of certain documents after the discovery cut-off date through the taking of an additional deposition. Now, when Defendants produced the Co-Author Agreements after the discovery cut-off, Plaintiffs did not ask for a deposition, and have instead pursued the instant motion, because Plaintiffs know that a deposition will not do anything to contradict the Co-Author Agreements or the fact they are fatal to Plaintiffs' claims.

Third, even if the Court were to conclude that Aftermath's production was not substantially justified or harmless, exclusion of the Co-Author Agreements would not be appropriate. In such an event, the Court can and should consider "other appropriate sanctions." Fed. R. Civ. P. 37(c)(1)(C). In this case, at the very most, Plaintiffs should be given what they claim they have been deprived of—namely, the opportunity to take a deposition concerning the Co-Author Agreements.

Fourth, Plaintiffs' argument that several of the Co-Author Agreements should be struck because Defendants did not submit a declaration authenticating them ignores local practice in this District. Authentication is not required for summary judgment exhibits except where there is a genuine issue as to authenticity, and Plaintiffs fail to raise any such issues. In any event, this issue is moot because Defendants are filing contemporaneous with this opposition authenticating declarations for the exhibits in issue.

II. PROCEDURAL HISTORY OMITTED BY PLAINTIFFS

Plaintiffs' highly general description of their discovery requests and the discovery history in this case omits a number of significant facts that put this motion in its complete context.

A. Although There Never Was A Date For Serving Initial Disclosures, Defendants Have Disclosed Relevant Information And Documents As They Have Discovered Them

Plaintiffs' claim that "Defendants failed to produce Rule 26(a)(1) Initial Disclosures" is wrong. Mot. at 4. Under the Rules, Defendants have not "failed" to do anything: *there never was a date for serving written disclosures*. The Federal Rules provide that "[a] party must make the initial disclosures *at or within 14 days after the party's Rule 26(f) conference unless a different time is set by stipulation or court order* ...." Fed. R. Civ. P. 26(a)(1)(C) (emphasis added). In this case, there never was a Rule 26(f) conference of counsel. Klaus Decl. ¶ 4. The Court did not set a date for an initial scheduling conference (which would have started the clock for a Rule 26(f) conference, *see* Fed. R. Civ. P. 26(f)(1)), or otherwise set a date for counsel to meet to formulate a discovery plan. Klaus Decl. ¶ 4. The Court did enter an initial Scheduling Order, but that Order said nothing about requiring the parties to conduct a Rule 26(f) conference of counsel or to serve written initial disclosures. *See id*. Ex. 2 (Docket No. 20).

Notwithstanding that there was no Rule 26(f) conference or date for serving written initial disclosures, Defendants operated as they knew the Court would expect them to, and they disclosed information about witnesses and documents. While Defendants did not serve a document captioned "Initial Disclosures," Plaintiffs never demanded that Defendants do so. Klaus Decl. ¶ 3. Surely, if Plaintiffs had been in doubt about the types of witnesses or documents relevant to this case, Plaintiffs would have asked Defendants for a written disclosure. Plaintiffs' failure to make any such request is explained by the fact that Defendants made numerous witnesses available for deposition and produced tens of thousands of pages of documents. Plaintiffs obviously are aware of relevant witnesses, because they have deposed a total of 13 current or former employees of Defendants. *Id*. Plaintiffs also have received ample document discovery from Defendants. Prior to the June 2, 2008 discovery cut-off, Defendants produced more than 57,000 pages of documents to Plaintiffs. *See id.*[2] Although Aftermath produced the Co-Author Agreements that are the subject of this motion after June 2, 2008, as explained below, Plaintiffs first requested those documents on June 10, 2008, and Aftermath's agreement to search for and produce such documents was embodied in an agreed-upon portion of the June 25, 2008 Order on Plaintiffs' Motion to Compel. *See* Section B, *infra*. Plaintiffs' claim that Aftermath's production pursuant to this Order violates Rule 26(e) simply ignores that Rule 26(e) provides a party "must supplement its disclosure or response ... as ordered by the court[,]" which is what Aftermath did. Fed. R. Civ. P. 26(e)(1)(B).

While Plaintiffs congratulate themselves for having served a document captioned "Initial Disclosures," those "disclosures" hardly qualify as a model under Rule 26(a), which may explain why Plaintiffs did not attach them to their motion. (Plaintiffs' "disclosures" are Ex. 3 to the Klaus Declaration.) In purported response to the requirements of Rule 26(a)(1)(A)(i) – "the name ... of each individual likely to have discoverable information ... that the disclosing party may use to support its claims or defenses" – Plaintiffs disclosed only *one* witness: Joel Martin. Klaus Decl. Ex. 3 at 2. Mr. Martin obviously is not the only person whom Plaintiffs believe supports their claims, given that Plaintiffs noticed and took the depositions of more than a dozen of Defendants' current and former employees, and have attached portions of a number of those deposition transcripts to their summary judgment opposition. Likewise, in supposedly responding to the requirements of Rule 26(a)(1)(A)(ii) – which calls for a copy or description "of all documents ... that the disclosing party has in its possession, custody or control and may use to support its claims or defenses" – Plaintiffs described *just two categories* of documents: the copyright registration certificates Plaintiffs attached to their Complaint, and an August 26, 2005 Mastertone Agreement between Plaintiffs and UMG Recordings, Inc. *See id*. at 3. Plaintiffs never served a supplement to their "Initial Disclosures." However, Plaintiffs' opposition to Defendants' summary judgment motion, filed August 28, 2008, includes dozens of documents that have long been in Plaintiffs' possession but that were not identified in Plaintiffs' "Initial Disclosures", including several documents not produced to Defendants until August 28, when they were produced concurrently with Plaintiffs' summary judgment opposition.[3] Moreover, *this week*, Plaintiffs produced still more documents that bear on the core issue of ownership of the compositions at issue. If the Court determines that exclusion of the Co-Author Agreements is required (which they should not be), then many of the documents upon which Plaintiffs rely must be struck as well.

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[2] As the Court knows, Aftermath is a defendant in another case pending in the Central District of California, where the same plaintiffs (suing as two different LLC corporations), represented by the same lawyer (Mr. Busch), are claiming underpayment of royalties for the distribution over Apple's iTunes (and other digital music providers) of many of the same Eminem songs implicated in this case. Because a number of the documents are relevant to both cases, Aftermath has made a single production applicable to both cases.

B. Plaintiffs Did Not Request The Co-Author Agreements Until After The Discovery Cut-Off

The documented discovery record establishes that Plaintiffs asked for the Co-Author Agreements for the first time on June 10, 2008, that Aftermath agreed to look for such agreements and produce them as part of Plaintiffs' post-discovery-cut-off motion to compel, and that Aftermath produced them promptly in accordance with the June 25, 2008 Order.

Not one of Plaintiffs' interrogatories and requests referred to co-authors of the Eminem compositions. Plaintiffs instead used overbroad and vague language in phrasing their interrogatories and document requests, many of which sought irrelevant information having no connection to this lawsuit. For example, Plaintiffs' Interrogatory No. 18 – which Plaintiffs now

[3] A chart illustrating Plaintiffs' own late production and non-disclosure of documents they possessed and have used to support their case is attached as Ex. 15 to the Klaus Declaration.

cite as a pinpoint request to identify the Co-Author Agreements – actually asked both Defendants to:

> Identify all musical copyright owners and administrators who have entered into agreements directly with you for the reproduction, distribution, transmission, synchronization, or public performance *of musical compositions*, and the identity of all payees under such agreements.

Klaus Decl. Ex. 4 at 11 (emphasis added).[4] By its terms, this interrogatory was not connected (or limited) to the compositions at issue in this lawsuit, but rather was directed to *any* agreement with *any* copyright owner or administrator covering *any* musical composition, whether or not part of this lawsuit. Because the scope of this interrogatory covered tens of thousands of compositions wholly unrelated to this lawsuit, both Apple and Aftermath objected to the interrogatory on overbreadth and other grounds. *Id*. Exs. 8 at 21-22 (Apple Objections and Responses) and 6 at 23 (Aftermath Objections and Responses). When Plaintiffs asked to meet and confer about this interrogatory, they did *not* assert that *Aftermath* should identify agreements with co-authors of the compositions at issue in this case. Indeed, Plaintiffs' meet-and-confer letter did not identify any issue *at all* with respect to *Aftermath's* response to Interrogatory No. 18. Instead, Plaintiffs' sole complaint was that Plaintiffs wanted *Apple* to supplement its response, *not* to identify any agreements Apple may have had with the co-authors of the compositions in this case, but rather any agreements Apple had with the owners of *other* musical compositions. Klaus Decl. Ex. 10 at 4 (Richard Busch Apr. 1, 2008 letter to Kelly Klaus and Daniel Quick) ("The information sought is relevant because Apple's course of conduct with regard to *other* copyright owners and administrators may shed light on their action or inaction

[4] Plaintiffs did not distinguish between the two Defendants – Apple and Aftermath – in their interrogatories and document requests. Plaintiffs sent a single set of interrogatories and document requests to both Defendants. Klaus Decl. Exs. 4 & 5.

with regard to plaintiffs, including as to the willfulness of Apple's infringing actions.") (emphasis added).

Likewise, Plaintiffs' document requests did not specifically ask for Co-Author Agreements.[5] Plaintiffs now claim that their Request for Production No. 6 asked for Co-Author Agreements. Mot. at 5-6. But that request does not refer at all to co-authors of the compositions at issue. What is more, in their meet-and-confer correspondence, Plaintiffs did not ask for Co-Author Agreements. Plaintiffs instead stated that they wanted production of agreements or licenses *from Plaintiffs* authorizing dissemination of the compositions over iTunes:

> We advised ... we would be willing to modify our broad requests seeking all documents pertaining to the Eminem songs to certain categories of information. Those categories are as follows: (1) any documents concerning *whether there was a need to obtain a publishing or mechanical license from plaintiffs*; (2) *any publishing or mechanical licenses allegedly obtained*; (4)) [sic] *whether plaintiffs had executed/returned such licenses* (4) any analysis of the controlled composition clause and what the language allows versus other Aftermath controlled composition clauses; (5) any communications with Joel [Martin] on these topics; (6) financial documents from Apple relating to the songs themselves, as well as their accounting to UMG or Aftermath' [sic] and (7) the number of downloads of the songs and the dates thereof.

Klaus Decl. Ex. 11 (Richard Busch email Apr. 16, 2006) (emphasis added).

Following the meet-and-confer process, Plaintiffs filed a Motion to Compel on their interrogatories and document requests. Plaintiffs' memorandum in support of that motion did not refer to Co-Author Agreements. *See* Pl's Mtn.. to Compel, Docket No. 33, filed May 2, 2008. In fact, Plaintiffs did not indicate that they were interested in obtaining Co-Author Agreements until June 10, 2008. Pursuant to the Local Rules, the parties met and conferred on that day to formulate the List of Unresolved Issues on the Motion to Compel. During that meet-and-confer, Plaintiffs stated for the first time that they wanted Aftermath to identify and produce any Co-Author Agreements that might cover the compositions in issue. Klaus Decl. ¶ 11. The fact that Plaintiffs were requesting this information for the first time, after the discovery cut-off, was memorialized (without objection from Plaintiffs) in Defendants' Arguments in the List of Unresolved Issues:

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[5] Plaintiffs cite to other requests and interrogatories that they claim encompassed the Co-Author Agreements. None of the requests or interrogatories Plaintiffs rely on specifically refer to co-author or co-publisher agreements. Klaus Decl. Ex. 4 & 5. The issue is not whether Plaintiffs' exceedingly broad requests could have encompassed these documents. Defendants objected to Plaintiffs' requests on the grounds of overbreadth, among other things, and entered into a lengthy meet and confer process with Plaintiffs in an attempt to divine a narrower category of documents that would satisfy them. Klaus Decl. Ex. 6-11. In the course of those meet and confer discussions, Plaintiffs never asserted that any of their Interrogatories or Requests were meant to seek co-author or co-publisher agreements until, as discussed below, the June 10, 2008 conference held on the eve of the hearing on their Motion to Compel. Klaus Decl. ¶ 11.

> During the meet and confer at 3 pm eastern, June 10, Plaintiffs announced for the first time that this interrogatory encompasses whole categories of documents never before raised in the meet and confer efforts prior to the filing of the motion to compel, in the motion to compel itself, or in the original draft of the joint list of unresolved issues. The motion to compel only sought this information from Apple. *At the eleventh hour, Plaintiffs are now requesting that Aftermath produce any and all agreements with other entities that have rights to the Eminem compositions.*

Klaus Decl. Ex. 12 at 4 (emphasis added). *See also id*. at 5 (Unresolved Issues on Request for Production No. 6) ("Plaintiffs are now requesting 'documents showing whether Apple or other parties offering the Eminem Compositions for the referenced uses have licensed the compositions ... by a sublicense granted through UMG or Aftermath *by any co-publisher of the Eminem Compositions*.") (emphasis added).

The Motion to Compel was set for hearing before Magistrate Judge Scheer on June 12, 2008. Prior to the hearing on that Motion, the parties met and conferred again regarding the outstanding requests. At that meet-and-confer, Plaintiffs and Aftermath agreed to a joint resolution of the disputes concerning Interrogatory No. 18 and Request for Production No. 6. Specifically, Aftermath agreed that it would determine whether it had any Co-Author Agreements, serve a supplemental interrogatory response stating whether it had any such Co-

Author Agreements, and if it did, Aftermath would produce those agreements promptly. Klaus Decl. ¶ 12. The parties' agreement to proceed in this manner is memorialized in the June 25, 2008 Order on Plaintiffs' Motion to Compel:

> Plaintiffs' Motion as to Interrogatory 18 and Document Request 6 is DENIED AS MOOT based on the parties' resolution as follows:
>
> b. Insofar as the motion is directed to Defendant Aftermath, *the motion is resolved by Aftermath's agreement that it shall state in writing by no later than July 3, 2008* as to whether Aftermath has in its possession, custody or control *any license, contract or agreement with any third party that Aftermath may contend gives it the right* (or the right to authorize others) to make available for permanent download sound recordings embodying the compositions at issue in this case. *If Aftermath states that it has such documents, Aftermath has agreed that it will produce such documents promptly following its written response on July 3, 2008*.

Klaus Decl. Ex. 1 at ¶ 2(b) (emphasis added).[6]

Aftermath fully complied with the Order. On July 3, 2008, Aftermath served a supplemental responses to Interrogatory No. 18, stating "Aftermath has in its possession, custody or control licenses, contracts or agreements with third parties that Aftermath may contend give it the right (or the right to authorize others) to make available for permanent download sound recordings embodying the compositions at issue in this case." Klaus Decl. Ex. 14 at 8-9. In the same document, Aftermath served a supplemental response to Request for Production No. 6, stating that Aftermath would produce any such agreements "on a rolling basis, as documents are collected, reviewed and processed." *Id*. at 10-11.

As agreed, Plaintiffs thereafter produced such agreements in rolling productions, as the Co-Author Agreements were collected, reviewed and processed. Klaus Decl. ¶ 14.[7] *At no time*

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[6] The parties memorialized this agreement in the hearing on Plaintiffs' Motion to Compel. In that hearing, Aftermath's counsel stated that if there were any such agreements, Aftermath would produce them. Klaus Decl. ¶ 13, Ex. 13 at 16-17.

[7] Based on the Co-Author Agreements that Plaintiffs themselves requested and obtained pursuant to the June 25, 2008 Order, Defendants filed an Alternative Motion for Partial Summary

have Plaintiffs ever asked for further information regarding the Co-Author Agreements or indicated they had any interest in taking any deposition related to any of the Co-Author Agreements. *Id*. at ¶ 15.

C. When Plaintiffs Produced Documents After The Discovery Cut-Off, Defendants Asked To Take Depositions They Believed They Needed

Defendants are not the only parties that have produced documents after the June 2, 2008 discovery cut-off. Plaintiffs have produced more than 240 pages – almost 25% of their total document production in this case – after June 2, 2008. Klaus Decl. ¶ 16. Plaintiffs produced the first installment of these documents on June 4, 2008. This production included a number of mechanical license requests and other relevant documents regarding the compositions at issue in this lawsuit that obviously had been in Plaintiffs' possession long before the discovery cut-off. *Id*. at ¶ 17. Instead of responding to this post-discovery-cut-off production with a motion to exclude, Defendants asked Plaintiffs to make Mr. Martin available to testify about Plaintiffs' late-produced documents, and Plaintiffs made him available for deposition on June 25, 2008. *Id*. If Plaintiffs genuinely had questions concerning the Co-Author Agreements, they could have followed the same procedure here and asked for the opportunity to take a deposition about documents Plaintiffs themselves requested. The fact that Plaintiffs raised no issue about the Co-Author Agreements, and instead filed this Motion, shows that Plaintiffs understand that these Agreements are fatal to their claim for copyright infringement and that Plaintiffs know a deposition will do nothing to change that.

Judgment on July 16, 2008 (Docket No. 53), arguing that the Co-Author Agreements provided additional grounds for summary judgment. Pursuant to the Court's July 25, 2008 Order, Defendants combined these arguments with the arguments set forth in Defendants' Summary Judgment Motion (Docket No. 34, filed May 5, 2008) into a Revised Summary Judgment Motion (Docket No. 66). The Revised Summary Judgment Motion is now pending. Contrary to the hyperbole in Plaintiffs' Motion, Defendants did not have "second thoughts about their chances of success with their first motion for summary judgment[.]" Mot. at 3. To the contrary, the Co-Author Agreements provided further grounds for summary judgment.

D. Plaintiffs Attached Documents To Their Summary Judgment Opposition That Their Case Depends On And That Plaintiffs Never Before Produced

Plaintiffs' June 4, 2008 production of documents was not the Plaintiffs' only document production made after the discovery cut-off. On August 28 – the day before Plaintiffs filed the instant Motion – Plaintiffs attached to their summary judgment opposition numerous documents upon which Plaintiffs base their claims, that have long been in Plaintiffs' possession, and that Plaintiffs never before produced. Klaus Decl. ¶ 19. Plaintiffs claim that these documents are agreements and assignments that support Plaintiffs' claim to own the copyrights in issue.[8] Ownership of a valid copyright is a core element of a copyright plaintiff's claim for infringement. *See Bridgeport Music, Inc. v. WB Music Corp.*, 508 F.3d 394, 398 (6th Cir. 2007). Plaintiffs did not identify the existence of any of these newly produced documents in Plaintiffs' "Initial Disclosures," in any supplement thereto (there was no such supplement), in any interrogatory responses, or elsewhere during this lawsuit. Klaus Decl. ¶ 19-20, Ex. 3. Nor did Plaintiffs produce any of these agreements before filing their summary judgment opposition, notwithstanding that Plaintiffs had agreed to produce documents relating to their claim of ownership and that these late-produced agreements purport to constitute the basis for Plaintiffs' claim that they own the copyrights in issue. *Id*. Exs. 16 & 17 (Plaintiffs' Responses to First Set of Interrogatories, Interrogatories No. 1, 2 and 5 and attached Schedule 1) and Exs. 18 & 19

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[8] Plaintiffs' August 28, 2008 production includes documents dated from 2000-2004 that Plaintiffs claim are assignments from Eight Mile Style to Martin Affiliated, another plaintiff in the case; and various documents that Plaintiffs claim are assignments or Writer-Co-Publisher Agreements between Eight Mile Style and Mark Bass, Jeff Bass, Louis Resto, and Steve King. Klaus Decl. ¶ 19. Plaintiffs also have attached in support of their summary judgment opposition the Eight Mile Style, LLC Operating Agreement, which Plaintiffs assert is the document that places into Eight Mile Style copyright interests that Mark and Jeff Bass allegedly obtained pursuant to other agreements. *Id*. at Ex. 20. This Operating Agreement was not part of the separate, simultaneous production Plaintiffs made on August 28, 2008 with their summary judgment opposition. It has, in fact, never actually been produced, except as an exhibit to Plaintiffs' summary judgment opposition.

(Plaintiffs' Responses to First Set of Requests for Production of Documents, Request No's. 8, 18 and 19).[9]

E. *This Week*, Plaintiffs Produced Additional Documents Acknowledging a Co-Owner of Some of the Compositions At Issue

In the midst of summary judgment briefing—mere *days* ago—Plaintiffs produced *still more* documents relating to the core issue of ownership of the copyrights at issue. These documents included multiple copyright registrations acknowledging that Ensign Music Publishing is a co-owner of compositions at issue in this case. Despite the fact that Defendants have repeatedly asked Plaintiffs to identify *all* co-owners and co-publishers, Plaintiffs did not identify Ensign as a registered co-claimant for these compositions until Monday, September 15, 2008—more than three months after discovery in this matter closed.

Plaintiffs cannot claim that they did not know about Ensign's rights in these compositions. The August 28, 2008 documents Plaintiffs produced with their summary judgment opposition included a co-publishing agreement in which Plaintiffs *themselves* transferred copyright interests to Ensign *in 1999*.[10] Plaintiffs' dereliction of their discovery obligations deprived Aftermath of the opportunity to submit additional evidence in support of Defendants' summary judgment motion—namely, mechanical licenses from Ensign (or its related company, Famous Music) covering the digital distribution of sound recordings embodying the compositions. Klaus Ex. 21 (licenses from Ensign for digital distribution of the compositions). While Defendants had (and previously produced to Plaintiffs) these licenses, Defendants' summary judgment motion relied only on authority from co-authors or co-publishers that Plaintiffs have acknowledged. Plaintiffs' belated acknowledgment of Ensign's copyright ownership interest thus prevented Defendants from including these mechanical licenses in support of their Revised Summary Judgment Motion.

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[9] Documents relating to Plaintiffs' claim of ownership are also encompassed within Defendants' First Set of Requests for Production of Documents, No. 1, 6, 13, and 14, all of which Plaintiffs agreed to produce documents in response to. Klaus Decl. ¶ 18, Ex. 16-19. Information and documents relating to co-publishers were also specifically encompassed within Defendants' Second Set of Requests for Production at No. 22 and Interrogatories No. 23 and 24. LeMoine Decl. Ex. 1-4. Plaintiffs also agreed to provide information responsive to these requests. *Id.* at Ex. 5-8.

[10] This document did not specify all of the compositions it related to. It was not until September 15, 2008 that Plaintiffs provided documents revealing that Ensign had an interest in the compositions at issue *in this case*.

III. ARGUMENT

A. Aftermath's Production Of The Co-Author Agreements Was In Accordance With The June 25, 2008 Order And Did Not Violate Rule 26(a) Or Rule 26(e)

Plaintiffs ask the Court to exclude the Co-Author Agreements as a sanction pursuant to Rule 37(c)(1). Rule 37(c)(1) provides in pertinent part:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1).

As the discovery record recounted above makes clear, Aftermath's production of the Co-Author Agreements did not violate any provision of Rule 26. First, Aftermath complied with Rule 26(e). Rule 26(e) provides that a party "who has responded to an interrogatory [or] request for production ... must supplement ... its disclosure or response ... as ordered by the court." Fed. R. Civ. P. 26(e)(1)(B). Aftermath's production of the Co-Author Agreements was in accordance with the express terms of the June 25, 2008 Order, which memorialized the parties' agreement concerning Co-Author Agreements: (1) Aftermath stated in a supplemental interrogatory response on July 3 that it had Co-Author Agreements; and (2) Aftermath promptly produced the Co-Author Agreements, completing its production less than four weeks following July 3, 2008. Klaus Decl. Ex. 1 and ¶ 2, 14.

Rule 26(e) also provides that a party is under an obligation to supplement its prior discovery responses upon learning that they are incomplete or incorrect in some material respect. Fed. R. Civ. P. 26(e)(1)(A). Aftermath did not violate that part of the Rule. Plaintiffs first stated that their requests sought Co-Author Agreements on June 10, 2008. Prior to the June 12, 2008 hearing on the Motion to Compel, Aftermath agreed to search for and produce such Agreements. It was only at that point that Aftermath became obligated to search for and produce Co-Author Agreements, and that is exactly what Aftermath did.

Second, Aftermath did not violate Rule 26(a). As set forth above, there never was a date for serving written initial disclosures because there never was a Rule 26(f) conference of counsel or Court Order setting the date for serving such written disclosures. Notwithstanding that there was no such date, Aftermath throughout the discovery period made substantial disclosures of documents and witness identities based on the information concerning the claims and defenses that then were reasonably available to Aftermath. When Plaintiffs requested Co-Author Agreements as part of the meet-and-confer on the Motion to Compel, Aftermath agreed to search for and produce any such agreements. There has been no violation of Rule 26(a).

B. Any Claimed Violation Of Rule 26(a) Or Rule 26(e) Was Substantially Justified, Harmless, Or Both

Even if the production of the Co-Author Agreements somehow violated Rule 26(a) or Rule 26(e) (which it did not), there is no basis for any sanction (exclusion or a less severe remedy) if the violation was "substantially justified or harmless." Fed. R. Civ. P. 37(c)(1). The factors that guide a court's discretion in making this determination are:

> (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date.

David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003). In this case, all of these factors show that any violation of Rule 26(a) or Rule 26(e) was substantially justified, harmless, or both.

1. Plaintiffs' Claim Of "Surprise" Is Disingenuous

Plaintiffs are not being candid when they say there is "no explanation" for the timing of the production of the Co-Author Agreements. Mot. at 10. The record underlying Plaintiffs' Motion to Compel and the June 25, 2008 Order governing the production of the Co-Author Agreements – almost all of which Plaintiffs omit in their Motion and attorney declaration – establishes exactly how, when and why the Co-Author Agreements came to be produced. It is completely disingenuous for Plaintiffs to portray themselves as surprised at that production. They know that they themselves demanded these documents for the first time more than a week after discovery closed. Klaus Decl. ¶ 11-13 and Exs. 12, 13.

Plaintiffs also are being less than forthcoming when they assert that they "had no knowledge" of any of the Co-Author Agreements. Mot. at 10. That claim is not true. F.B.T. Productions – which is owned by the same two owners of Eight Mile Style and managed by Eight Mile Style's manager, Joel Martin – has directed that audits be conducted of F.B.T.'s interests under some of the Co-Author Agreements. *See* Klaus Decl. Ex. 22 (FBT-00144) (report from F.B.T.'s auditor, *copied to Joel Martin*, stating that the auditor is aware of the "First Look Agreement" dated August 20, 1999, between Shady Records, Inc. and Interscope Records, and that "[t]he related accountings will be the subject of a separate report."). Further, Plaintiffs know who the co-authors of the compositions are, they know that a number of them are recording artists as well, and that they have their own artists agreements. Klaus Decl. ¶ 16 & 17 (Plaintiffs' Schedule 1, listing album titles for compositions). Plaintiffs have no plausible claim of surprise.

2. Plaintiffs' Claim Of Prejudice Is Unfounded And The Result Of A Tactical Decision Not To Attempt To Cure Any Prejudice

Plaintiffs insist they have been prejudiced because they have been forced to respond to the Co-Author Agreements "without the benefit of full discovery." Mot. at 10. Notably, Plaintiffs fail to state what they think any such discovery would show. The Co-Author

Agreements are clear, and Plaintiffs offer no reason to think there are any additional documents or depositions that would change their language or effect.

In any event, Plaintiffs' assertion of prejudice falls flat because Plaintiffs did nothing to try to cure the claimed prejudice. This is not the first time documents have been produced after the date of a discovery cut-off. As is clear from the example of Plaintiffs' first post-discovery-cut-off production, if a deposition regarding the Co-Author Agreements were necessary, they could have asked Defendants to consent to a deposition, as was done with Mr. Martin when Plaintiffs produced documents after the discovery cut-off date. Klaus Decl. ¶ 17. Plaintiffs did not even inquire about the possibility of taking a deposition or any other type of discovery concerning the Co-Author Agreements. Plaintiffs simply prepared this Motion. The fact that Plaintiffs took no steps to seek the discovery they claim they need reflects Plaintiffs' awareness that further discovery will not benefit Plaintiffs or explain away the Co-Author Agreements.

3. The Production Of The Co-Author Agreements Will Not Disrupt The Trial In This Case

Trial in this case currently is not set to begin until November 10, 2008, and the parties have not even exchanged an exhibit list or started meeting and conferring on the contents of the pretrial order. Allowing the Co-Author Agreements to be part of the record will not do anything to disrupt the trial. Indeed, consideration of the Co-Author Agreements, along with the other summary judgment evidence, will *obviate* the need for a trial or (if the Court grants partial summary judgment) substantially narrow the issues to be tried.

4. There Is No Evidence Of Aftermath Acting In Bad Faith

Plaintiffs do not point to any evidence of bad faith in Aftermath's production of the Co-Author Agreements, and there is none. It is clear that Aftermath produced the Co-Author Agreements when it did in accordance with the terms of the parties' agreement prior to the hearing on Plaintiffs' Motion to Compel and the June 25, 2008 Order embodying that agreement.

Aftermath obviously had no incentive to delay production of the Co-Author Agreements; the Co-Author Agreements could only help Aftermath's case. There is no basis for believing that Aftermath has acted in bad faith or has tried to "sandbag" Plaintiffs.[11]

All relevant factors show that any violation of Rule 26(a) or Rule 26(e) was substantially justified, harmless, or both. The Court should decline to issue any sanction concerning the Co-Author Agreements.

C. If The Court Determines There Was A Violation Of Rule 26(a) Or Rule 26(e) That Was Not Substantially Justified Or Harmless, The Court Should Impose A Lesser Sanction Than Exclusion Of Co-Author Agreements

Plaintiffs claim that if there is a violation of Rule 26(a) or Rule 26(e) that is neither substantially justified nor harmless, the Court has no choice but to exclude the evidence. But that is not what Rule 37(c)(1) says. The Rule states that "[i]n addition to *or instead of this sanction* [*i.e.*, exclusion], the court, on motion and after giving an opportunity to be heard: *may*" take a number of actions, including to "impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." Fed. R. Civ. P. 37(c)(1) (emphasis added). The Sixth Circuit has held that "Rule 37(c)(1) does not compel the district judge to exclude [non-disclosed evidence] in its entirety[,]" and that the district court may use "sensible" and "equitable" solutions to achieve the purposes of the disclosure rules. *Roberts v. Galen of Virginia, Inc.*, 325 F.3d 776, 784 (6th Cir. 2003).

For the reasons set forth above, Defendants do not believe there has been any violation of Rule 26(a) or Rule 26(e), but that even if there was, such violation was substantially justified, harmless, or both. Should the Court disagree, there is an equitable solution that is less draconian than the sanction of exclusion of highly relevant evidence: allow Plaintiffs to depose a witness whose testimony may be relevant concerning the Co-Author Agreements. That solution would allow litigation of the Co-Author Agreements to be decided on its merits and would give Plaintiffs what they claim they were deprived of (though they never asked for it), namely, the opportunity to take further discovery regarding the Co-Author Agreements.

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[11] Moreover, any assertion by Plaintiffs that Aftermath has acted in bad faith would have to be squared with Plaintiffs' own record of producing documents after the discovery cut-off on multiple occasions that they believe are important to their own case. These include documents purported to substantiate Plaintiffs' claim of ownership that were produced for the first time with Plaintiffs' summary judgment opposition, *and* documents relating to ownership produced *this week* that would have provided Aftermath with additional bases for summary judgment had they been timely produced. *See* Procedural Background, Section D, *supra*.

D. Plaintiffs Do Not Raise Any Issue Concerning Whether Any Summary Judgment Exhibits Are Authentic

Plaintiffs' final argument is that the Court should strike several of the Co-Author Agreements and other summary judgment exhibits on the ground that Defendants did not submit a declaration authenticating the Agreements.

The practice in this District is not to require the submission of authenticating declarations unless there is a genuine issue as to the authenticity of an exhibit. Plaintiffs' authentication argument does not raise *any* issue about the authenticity of any of the exhibits in question. *See* Mot. at 10-11. This portion of Plaintiffs' Motion can and should be denied on this ground alone. Nevertheless, to obviate any issue regarding this matter, Defendants are filing along with this Opposition declarations from Rand Hoffman, Cynthia Oliver, Irek Lacki and Melinda LeMoine authenticating all of the exhibits in issue.

IV. CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the all counsel.

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